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No. 99-1916 (2)

In the Supreme Court of the United States

MICHAEL D. LANDRY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Federal Deposit Insurance Corporation, which ordered that petitioner should be removed from his position as a bank officer and prohibited from further participation in the banking industry, should be set aside on the ground that the administrative law judge who conducted a hearing and issued a recommended decision was appointed in an unconstitutional manner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Air Canada v. *Department of Transp.*, 148 F.3d 1142 (D.C. Cir. 1998)	12
Buckley v. *Valeo*, 424 U.S. 1 (1976)	8, 9
DSE, Inc. v. *United States*, 169 F.3d 21 (D.C. Cir. 1999)	12
Edmond v. *United States*, 520 U.S. 651 (1997)	11, 12
Freytag v. *Commissioner*, 501 U.S. 868 (1991)	6, 9-10
Landry, In re, FDIC-95-65e, 1999 WL 639568 (FDIC July 8, 1999)	8
Ryder v. *United States*, 515 U.S. 177 (1995)	13-14
Weiss v. *United States*, 510 U.S. 163 (1994)	11

Constitution, statutes, and regulations:

U.S. Const. Art. II, § 2, Cl. 2 (Appointments Clause)	5, 7-8, 9, 12
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 916, 103 Stat. 486 (12 U.S.C. 1818 note)	2
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 16(1)(B), 10 U.S.C. 816(1)(B)	11
Art. 16(2)(C), 10 U.S.C. 816(2)(C)	11
Art. 51(d), 10 U.S.C. 851(d)	11
Art. 62(a)(1), 10 U.S.C. 862(a)(1) (1994 & Supp. IV 1998)	11
Art. 66(a), 10 U.S.C. 866(a)	11
Art. 67(a), 10 U.S.C. 867(a)	12

Statutes and regulations—Continued: Page

5 U.S.C. 554 2
5 U.S.C. 556 2
5 U.S.C. 706 12
12 U.S.C. 1462a(a) 2
12 U.S.C. 1818(e) 2, 4, 13
12 U.S.C. 1818(e)(4) 2, 8
12 U.S.C. 1818(h)(1) 2, 3, 8, 13
12 U.S.C. 1818(h)(2) 3
26 U.S.C. 7443A(b)(1)-(3) 9
26 U.S.C. 7443A(b)(4) 9
28 U.S.C. 636 11
12 C.F.R.:
Section 308.25(h) 10
Section 308.26(c) 10
Section 308.28(d) 10
Section 308.34(c) 10
Section 308.38 3
Section 308.38(a) 8
Section 308.39 3
Section 308.40 3
Section 308.40(c) 8
Section 308.103 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 204 F.3d 1125. The final order of the Federal Deposit Insurance Corporation (FDIC) Board of Directors (Pet. App. 40a-108a) is reported at 1 FDIC Enforcement Decisions and Orders ¶ 5256, at A-3017. The order of the FDIC Board of Directors denying petitioner's motion for stay pending review in the court of appeals is reported at 1 FDIC Enforcement Decisions and Orders ¶ 5259, at A-3053, WL 639568. The recommended decision of the Administrative Law Judge (Pet. App. 109a-222a) is reported at 1 FDIC Enforcement Decisions and Orders ¶ 5256, at A-3044.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. The petition for a writ of certiorari was filed on May 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has authorized the Federal Deposit Insurance Corporation to remove a bank officer from his position and to prohibit him from further participation in the banking industry when his actions threaten the integrity or stability of an insured bank. 12 U.S.C. 1818(e). An officer who has been notified of the FDIC's intention to remove and prohibit him from such participation may request an administrative hearing. 12 U.S.C. 1818(e)(4). If the officer requests a hearing, the FDIC assigns the case to an administrative law judge (ALJ) from the Office of Financial Adjudications (OFIA) for a formal, on-the-record administrative hearing. 12 U.S.C. 1818(e)(4) and (h)(1); 5 U.S.C. 554, 556; 12 C.F.R. 308.103.

In 1989, Congress directed the federal banking agencies to "establish their own pool of administrative law judges" to conduct hearings. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 916, 103 Stat. 486 (12 U.S.C. 1818 note). Pursuant to that authority, the banking agencies established the OFIA. Pet. App. 96a-97a, 207a. One of the federal banking agencies, the Office of Thrift Supervision (OTS)—an agency within the Department of the Treasury, see 12 U.S.C. 1462a(a)—employed two ALJs for OFIA assignment. Pet. App. 95a n.36, 96a-97a, 207a-208a. Those ALJs had previously been certified as qualified by the Office of Personnel Management. See *id.* at 211a-212a n.3, 217a.

At the conclusion of the hearing, the ALJ issues a recommended decision and refers the matter to the FDIC Board of Directors for a formal and final decision. 12 C.F.R. 308.38. The FDIC Board reviews the administrative record de novo, considers any exceptions filed by either party (the bank officer or FDIC Enforcement Counsel), and issues a final decision and order. 12 U.S.C. 1818(h)(1); 12 C.F.R. 308.39, 308.40. If the FDIC Board issues an order removing the officer and/or prohibiting him from further participation in the industry, the officer may file a petition for review "in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit." 12 U.S.C. 1818(h)(2).

2. Petitioner was the Chief Financial Officer, Senior Vice President, and Cashier of the First Guaranty Bank of Hammond, Louisiana (Bank). Pet. App. 2a. In 1990, the FDIC ordered the Bank to increase its capital, and the FDIC subsequently threatened to terminate the Bank's deposit insurance due to its dangerously low capital level. *Id.* at 3a-4a. Petitioner and two of his associates, also officers or senior managers of the Bank, devised a scheme to enhance the Bank's capital and acquire a controlling interest in it without investing any of their own funds. *Id.* at 2a-4a, 8a-50a. That scheme, which they called the "Pangaea Plan," involved the formation of a holding company that would acquire 80% of the Bank's outstanding stock and sell 30% of the holding company's stock to investors. *Id.* at 4a, 51a. Petitioner and his cohorts planned to keep 70% of the holding company's stock for themselves without paying for it. *Id.* at 4a, 51a-52a. To promote their scheme, petitioner and the others traveled internationally at the Bank's expense; they also caused the Bank to pay for

expensive service contracts and to make poorly underwritten loans to potential investors in their plan. *Id.* at 5a-6a, 51a-64a. Petitioner's activities provided little or no benefit to the Bank and caused the Bank to lose hundreds of thousands of dollars at a time when it could least afford it. *Id.* at 5a-6a, 25a-31a, 77a-79a.

3. On April 30, 1996, the FDIC issued a notice of its intent to remove petitioner from the Bank and prohibit him from further participation in the banking industry. Pet. App. 2a, 40a. One of the two OFIA ALJs was assigned to conduct an administrative hearing in the case. See *id.* at 2a-3a, 42a, 97a, 109a-110a, 207a-208a. The ALJ conducted a two-week evidentiary hearing and subsequently issued a decision recommending that petitioner be removed from the Bank and prohibited from further participation in the banking industry. See *id.* at 2a-3a, 42a, 109a-220a.

On May 25, 1999, the FDIC Board of Directors issued its Final Decision and Order, in which it found that grounds existed under 12 U.S.C. 1818(e) to remove petitioner from his position and prohibit him from further participation in the banking industry. Pet. App. 101a, 40a-108a. The Board made clear that it "ha[d] reviewed the record in its entirety" and "ha[d] adopted the ALJ's findings of fact and conclusions of law because they are supported by the preponderance of the evidence." *Id.* at 48a, 92a-93a.[1] Petitioner then requested review by the court of appeals.

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[1] In his submissions to the Board, petitioner contended, *inter alia*, that "the OTS's hiring of [the ALJ] and OFIA's assignment of him to this matter were unconstitutional" because "the OTS, the FDIC and OFIA are constitutionally disabled from appointing any employees who might be regarded as 'inferior officers.'" Pet. App. 96a. The Board rejected that contention, noting that "Congress has, in many instances and for many years, vested in non-Cabinet

4. The court of appeals denied the petition for review. Pet. App. 1a-39a. Petitioner contended, *inter alia*, that the Board's removal order was invalid because the ALJ who had heard the evidence and issued a recommended decision was an "inferior Officer" who had not been appointed in conformity with the Appointments Clause of the Constitution, Article II, Section 2, Clause 2. The court rejected that contention. Pet. App. 12a-16a. The court explained that the ALJ involved in petitioner's case was an employee rather than an inferior officer because the ALJ exercised "purely recommendatory powers" and had no authority to issue a final decision in any case. *Id.* at 16a; see also *id.* at 7a-8a ("The FDIC itself determined [petitioner's] responsibility after reviewing the ALJ's recommended decision de novo."); *id.* at 14a (explaining that "[f]inal decisions are issued only by the FDIC Board of Directors" and that "the FDIC Board makes its own factual findings").[2]

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agencies the authority to appoint inferior officers." *Ibid.* The Board explained that in FIRREA, "Congress directed the federal banking agencies to hire ALJs," and that the agencies have "agreed to share ALJs who, as an administrative matter, would be hired by OTS." *Ibid.* The Board concluded that

> pursuant to FIRREA, Congress, within its discretion, directed that the federal banking agencies establish a pool of ALJs to preside in administrative enforcement proceedings. To that end, the agencies established OFIA to oversee the work of the ALJ thus employed by OTS, and through which the banking agencies have the use of a "pool" of ALJs. Accordingly, the ALJ in this case was validly appointed within the meaning of the Appointments Clause.

Id. at 96a-97a.

[2] As we explain above (see note 1, *supra*), the FDIC Board concluded that even if the ALJ in this case was an inferior officer, his hiring by OTS and his assignment by OFIA were consistent

The court of appeals distinguished this Court's ruling in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), which held that special trial judges (STJs) of the United States Tax Court are "inferior Officers" within the meaning of the Appointments Clause. The court of appeals explained that *Freytag* was not controlling because STJs (unlike the ALJ at issue here) are authorized to issue final decisions in certain categories of cases. See Pet. App. 14a-16a.

The court of appeals also rejected petitioner's contention that the FDIC had improperly refused to produce certain documents that he needed for his defense, and had improperly invoked the deliberative process and law enforcement privileges. Pet. App. 16a-23a. The court held as well that the Board's removal order was supported by substantial evidence. *Id.* at 24a-31a. It stated, in that regard, that petitioner's "use of Bank funds * * * in pursuit of breathtakingly irresponsible schemes" had exposed the Bank to "an undue and abnormal risk of insolvency." *Id.* at 26a.

Judge Randolph filed a separate opinion concurring in part and concurring in the judgment. Pet. App. 31a-39a. Judge Randolph concluded that "[t]here are no relevant differences between the ALJ in this case and the special trial judge in *Freytag*," *id.* at 33a, and that the ALJ was therefore properly regarded as an inferior officer, *id.* at 33a-37a. Judge Randolph stated, however, that "[g]iven the FDIC's *de novo* review and the majority's thorough rejection of [petitioner's] various claims of error," petitioner had "suffered no prejudice" as a result of the purported Appointments Clause violation. *Id.* at 38a. He therefore agreed with the ma-

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with the Appointments Clause. The FDIC did not press that argument in the court of appeals.

jority that the petition for review of the FDIC's final order should be denied. *Id.* at 39a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 9) that the panel decision will have a wide ranging effect on "a class of judges numbering more than 1,000." That assertion considerably overstates the significance of the court of appeals' decision. The court's decision directly addresses the constitutional status only of the ALJ (one of the two administrative law judges employed by OTS and assigned by OFIA) who presided at the administrative hearing in this case. The court of appeals did not purport to establish any categorical rule that administrative law judges are employees rather than "inferior Officers" for purposes of the Appointments Clause. To the contrary, the court's analysis focuses on the role of a particular ALJ, and his relationship to higher agency authority, within a specific decision-making structure.

2. The Appointments Clause of the Constitution states that the President

> shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, Cl. 2. The "Officers of the United States" to which the Appointments Clause refers include "any appointee exercising significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976). The term does not, however, encompass "employees of the United States," who are "lesser functionaries subordinate to officers of the United States." *Id.* at 126 n.162.

As the court of appeals correctly held, the ALJ who conducted the administrative hearing in this case is properly regarded as an employee rather than an "inferior Officer." Contrary to petitioner's contention (Pet. 11), the ALJ does not "perform adjudicatory functions otherwise those of agency heads." Any decision to remove and prohibit a bank officer must be made by the FDIC Board of Directors. 12 U.S.C. 1818(e)(4) and (h)(1). Pursuant to FDIC regulations, the ALJ is charged with producing only a "recommended decision, recommended findings of fact, recommended conclusions of law, and [a] proposed order." 12 C.F.R. 308.38(a). The FDIC Board of Directors renders a final decision and order after conducting a de novo review of the entire administrative record. 12 U.S.C. 1818(e)(4) and (h)(1); 12 C.F.R. 308.40(c).

Under no circumstances can the ALJ render the final decision of the FDIC. In the course of rendering its decision, moreover, the Board makes its own factual findings and does not accord deference to the findings of the ALJ. 12 U.S.C. 1818(h)(1); 12 C.F.R. 308.40(c); see also *In re Landry*, FDIC-95-65e, 1999 WL 639568, at *1 (FDIC July 8, 1999) (denying petitioner's request for a stay pending review in the court of appeals, and noting that the FDIC had given petitioner's case "an exhaustive de novo review"). Thus, the ALJ's role within the FDIC's decisionmaking scheme belies the

contention that the ALJ "exercis[es] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126.

Petitioner principally relies (Pet. 12-15) on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), in which this Court held that special trial judges (STJs) of the Tax Court are "inferior Officers" rather than employees for purposes of the Appointments Clause. The ALJ in this case, however, differs in important respects from the STJs at issue in *Freytag*. Most significantly, STJs are authorized to render final decisions in declaratory judgment proceedings and limited-amount tax cases pursuant to 26 U.S.C. 7443A(b)(1)-(3). See 501 U.S. at 873, 882. This Court held that the STJs' authority to render final decisions in those categories of cases required that they be treated as inferior officers for all purposes. See *id.* at 882 ("The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution."). Because the ALJ involved in the present matter is not empowered to issue a final decision in *any* type of case, that portion of the *Freytag* Court's analysis is altogether inapplicable here.

As the concurring judge in the court of appeals emphasized (see Pet. App. 35a-36a), one paragraph of the *Freytag* opinion suggests that STJs function as "inferior officers" even with respect to cases under 26 U.S.C. 7443A(b)(4), in which the STJ lacks authority to issue a final decision. The *Freytag* Court stated:

> The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the

> duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

501 U.S. at 881-882 (citations omitted).

Even with respect to that aspect of the *Freytag* Court's analysis, however, the ALJ here differs significantly from a Tax Court STJ. The ALJ at issue in this case lacks "the power to enforce compliance with discovery orders" (501 U.S. at 882), since he is not vested with contempt powers. Rather, an aggrieved party must apply to a United States District Court for enforcement of a subpoena issued by the ALJ. See 12 C.F.R. 308.25(h), 308.26(c), 308.28(d), 308.34(c). Moreover, even in those cases that the STJ lacks final authority to decide, the STJ's factual findings are reviewed by the Tax Court under a deferential standard. See Pet. App. 14a; *Freytag*, 501 U.S. at 874 n.3. The FDIC, by contrast, accords no deference to the ALJ's findings of fact. See Pet. App. 14a; pp. 8-9, *supra*.[3]

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[3] Petitioner's attempt (see Pet. 10-11) to analogize the ALJ to a federal district court or magistrate judge is similarly misconceived.

Petitioner also relies (Pet. 15, 16) on *Weiss* v. *United States*, 510 U.S. 163 (1994), and *Edmond* v. *United States*, 520 U.S. 651 (1997), which held that military trial and appellate judges are inferior officers. Petitioner's reliance on those decisions is misplaced. The military trial judges at issue in *Weiss* "rule[] on all legal questions, and instruct[] court-martial members regarding the law and procedures to be followed." 510 U.S. at 167. The trial judge may also render the final decision in a case with the consent of the accused. See Art. 16(1)(B) and (2)(C) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 816(1)(B) and (2)(C); Art. 51(d), UCMJ, 10 U.S.C. 851(d); *Weiss*, 510 U.S. at 168. And while the court-martial's findings and sentence are subject to review in any case in which the accused is convicted (see Pet. 15), "the United States may not appeal an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification." Art. 62(a)(1), UCMJ, 10 U.S.C. 862(a)(1) (1994 & Supp. IV 1998). The court-martial's decision is therefore final and unreviewable in a significant category of cases.

Edmond is also distinguishable. The military appellate judges at issue in *Edmond* render final decisions in cases in which the Judge Advocate General declines to invoke the jurisdiction of the Court of Appeals for the Armed Forces (CAAF) and the CAAF denies the defendant's request for discretionary review. See Art. 66(a), UCMJ, 10 U.S.C. 866(a); *Edmond*, 520 U.S. at 664-665. And even where the CAAF does exercise jurisdiction, it reviews the factual findings of the inter-

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District judges routinely decide contested cases, and magistrate judges are authorized, with the consent of the parties, to make final dispositions of a variety of matters. See 28 U.S.C. 636.

mediate court under a deferential standard. See *id.* at 665.[4]

3. In conducting judicial review under the Administrative Procedure Act, a court "shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706. Courts are generally reluctant to set aside agency action unless "the party asserting error [can] demonstrate prejudice from the error." *DSE, Inc.* v. *United States*, 169 F.3d 21, 31 (D.C. Cir. 1999) (quoting *Air Canada* v. *Department of Transp.*, 148 F.3d 1142, 1152 (D.C. Cir. 1998)). Petitioner does not contest the court of appeals' determination that the FDIC's decision in this case was supported by substantial evidence. Indeed, as the court of appeals observed, the FDIC Board's most compelling evidence came from petitioner himself. See Pet. App. 6a, 28a, 38a n.4.

Even assuming *arguendo* that the ALJ was not appointed in conformity with the Appointments Clause,

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[4] In concluding that judges on the Coast Guard Court of Criminal Appeals are "inferior" rather than "principal" officers, the Court in *Edmond* observed that those judges "have no power to render a final decision on behalf of the United States *unless permitted to do so by other Executive officers*." 520 U.S. at 665 (emphasis added). The underscored language reflects the fact that the CAAF must review any case that the Judge Advocate General directs it to hear, and may review any other case "upon petition of the accused." See *ibid.* (quoting Art. 67(a), UCMJ, 10 U.S.C. 867(a)). But while decisions of the Court of Criminal Appeals are subject to further review at the discretion of Executive Branch officials, that court nevertheless renders the ultimate decision in numerous cases where the Judge Advocate General does not invoke the CAAF's jurisdiction and the CAAF denies the defendant's petition for review. Petitioner's description of the case omits the underscored language. See Pet. 16.

such a deficiency would not provide a basis for invalidating the order that is before this Court. The decision under review is a decision of the FDIC Board, not a decision of the ALJ. See 12 U.S.C. 1818(e), (h)(1) and (h)(2). As explained above, the ALJ simply presented the Board with recommendations. The decision from which petitioner seeks relief was issued by the Board itself, which engaged in de novo review of petitioner's legal and factual claims; the ALJ's recommendation had no more than persuasive force and did not constrain the Board's discretion in any way. Because the ALJ's recommendation is neither the cause of petitioner's legal disabilities nor the subject of the current review proceeding, any defect in the ALJ's selection would not provide a basis for setting aside the order of the Board.

In *Ryder* v. *United States*, 515 U.S. 177, 186-188 (1995), this Court held that a constitutional infirmity in the method of selection of judges on the Coast Guard Court of Military Review (now called the Court of Criminal Appeals) was not rendered harmless by the availability of further review in the Court of Military Appeals (now called the CAAF). Petitioner relies (Pet. 16) on *Ryder* as support for the proposition that "the FDIC Board's *de novo* review does not cure the constitutional violation in the instant case." In *Ryder*, however, the Court emphasized that while the Courts of Military Review "exercise *de novo* review over the factual findings and legal conclusions of the court-martial," the Court of Military Appeals applies a narrower standard of review and will affirm a judgment of conviction "so long as there is some competent evidence in the record to establish the elements of an offense beyond a reasonable doubt." *Ryder*, 515 U.S. at 187. The Court concluded:

> Examining the difference in function and authority between the Coast Guard Court of Military Review and the Court of Military Appeals, it is quite clear that the former had broader discretion to review claims of error, revise factual determinations, and revise sentences than did the latter. It simply cannot be said, therefore, that review by the properly constituted Court of Military Appeals gave [the defendant] all the possibility for relief that review by a properly constituted Coast Guard Court of Military Review would have given him.

Id. at 187-188. Here, by contrast, the FDIC issues its own decision and accords no deference to the findings of the ALJ. There is consequently no basis for concluding that any defect in the manner of the ALJ's selection prejudiced petitioner or deprived him of any substantive protection guaranteed by law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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